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In the Supreme Court of the United States

OCTOBER TERM, 1958

UNITED STATES OF AMERICA, APPELLANT

v.

NATIONAL MALLEABLE & STEEL CASTINGS CO., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO

JURISDICTIONAL STATEMENT

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INDEX

	Page
Opinion below	1
Jurisdiction	1
Statute involved	2
Questions presented	3
Statement	5
The questions are substantial	15
Conclusion	19
Appendix A	20
Appendix B	72

CITATIONS

Cases:	
American Tobacco Co. v. *United States*, 328 U. S. 781	17
Interstate Circuit, Inc. v. *United States*, 306 U. S. 208	19
Theatre Enterprises, Inc. v. *Paramount Film Distributing Corp.*, 346 U. S. 537	19
United States v. *Aluminum Co. of America*, 148 F. 2d 416	17
United States v. *DuPont de Nemours & Co.*, 351 U. S. 377	2, 17
United States v. *General Electric Co.*, 272 U. S. 476	15
United States v. *Line Material Co.*, 333 U. S. 287	2, 16
United States v. *Masonite Corp.*, 316 U. S. 265	18
United States v. *United States Gypsum Co.*, 333 U. S. 364	16, 19
United States v. *United States Gypsum Co.*, 340 U. S. 76	16
Statute:	
Act of July 2, 1890, 26 Stat. 209, as amended, 15 U. S. C. 1, 2, 4:	
Section 1	2, 4, 15
Section 2	2, 3, 15
Section 4	2

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JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the district court (Appendix A, *infra,* pp. 20–71) has not yet been reported.

JURISDICTION

This suit was brought under Section 4 of the Sherman Act, 26 Stat. 209, as amended, 15 U. S. C. 4. The judgment of the district court (Appendix B, *infra,* p. 72) was entered on March 12, 1958, and the notice of appeal was filed on May 9, 1958. The jurisdiction of this Court to review by direct appeal the judgment entered in this cause is conferred by Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, 15 U. S. C. 29, as amended by Section 17

of the Act of June 25, 1948, 62 Stat. 989. *United States* v. *Line Material Co.*, 333 U. S. 287; *United States* v. *DuPont de Nemours & Co.*, 351 U. S. 377.

STATUTE INVOLVED

The pertinent provisions of Sections 1, 2, and 4 of the Act of July 2, 1890, 26 Stat. 209, as amended (15 U. S. C. 1, 2, 4), commonly known as the Sherman Act, are as follows:

> SEC. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: * * *. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, * * *.
>
> SEC. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, * * *.
>
> * * * * *
>
> SEC. 4. The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such violations. * * *

QUESTIONS PRESENTED

Appellees are the five companies (referred to herein as the defendant manufacturers) which are the sole manufacturers of the standard coupler and its parts, and the Association of American Railroads (referred to, together with its predecessors, as AAR), an unincorporated association composed of the principal railroads of the country. The standard coupler is the device adopted by AAR as standard for coupling railroad cars with one another. The complaint charged that appellees have been and are engaged in a conspiracy to restrain and monopolize trade and commerce in the standard coupler and its parts, and that the defendant manufacturers have been and are monopolizing such commerce. After trial, the district court found that these charges had not been sustained and it entered a judgment dismissing the Government's complaint. The appeal from this judgment presents the following questions:

1. Whether, on the showing that defendant manufacturers had jointly designed and developed the standard coupler, had jointly withheld from others data as to the size, dimensions, and tolerances requisite for manufacture of the standard coupler and its parts, and had erected other barriers against entry into manufacture of such coupler and its parts, the district court erred in failing to find and to conclude that defendant manufacturers possessed the power and purpose to exclude competitors, and were monopolizing and conspiring to monopolize a part of interstate commerce in violation of Section 2 of the Sherman Act.

2. Whether, on such showing, the district court erred in failing to find and to conclude that defendant manufacturers, the sole manufacturers of the standard coupler and its parts, possessed the power and purpose to fix and control the price of these products, and were monopolizing and conspiring to monopolize a part of interstate commerce in violation of Section 2.

3. Whether, on the showing that defendant manufacturers (1) had for many years sold the standard coupler and each of its parts at uniform prices, determined in accordance with a particular system of pricing and pursuant to successive written patent-pooling, price-fixing agreements, and (2) had, following termination of their written agreement, continued the same system of pricing, maintained absolute price uniformity, delegated price determination to one of their number, and exchanged among themselves pricing views and price information, the district court erred in failing to find and to conclude that defendant manufacturers continued their conspiracy to sell at uniform prices and to eliminate price competition in violation of Section 1 of the Sherman Act.[1]

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[1] A further question which the appeal presents and which the Government reserves the right to argue is whether the district court erred in rejecting all evidence relating to defendant manufacturers' participation in a foreign cartel, upon the ground that dissolution of the cartel had rendered moot all charges of the complaint respecting restraint of foreign commerce, when such evidence was offered to show that the Mechanical Committee (composed of one representative of each defendant manufacturer) had engaged in exclusionary activities and had not served solely as a joint medium for engineering and technical development of the standard coupler.

STATEMENT

The complaint charged a continuing conspiracy by the defendants, beginning about 1912, to restrain and monopolize interstate commerce in railroad couplers and their parts, and monopolization of such commerce by the defendant manufacturers since about the year 1920. The defendants were the five defendant manufacturers, AAR, and Foundries Export Co., Inc.[2] Coincident with the filing of the complaint in the instant case, a criminal indictment making identical charges of violation of the Sherman Act was returned against the same defendants other than AAR, plus four officers of defendant manufacturers. After all but one of the defendant manufacturers (and its officer) had pleaded nolo contendere and had been fined a total of $80,000, the district judge (the same judge who later heard the instant civil case) presided at a jury trial of the two remaining defendants. At the conclusion of the plaintiff's evidence he granted judgments of acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure.

At the close of the trial of the instant case, the district court rendered an oral opinion setting forth the grounds for its conclusion that, on the evidence, no violation of the Sherman Act had been shown. Later, the court filed detailed findings of fact and four gen-

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[2] After the filing of the complaint, this corporation was dissolved and, with the Government's consent, it was dismissed as a defendant. The complaint alleged that with respect to foreign commerce in couplers Foundries Export Co., Inc., the defendant manufacturers, and three named foreign corporations had agreed upon an allocation of exclusive sales territories and upon sales prices in foreign countries.

eral conclusions of law and entered judgment dismissing the complaint.

The basic specific facts on which the Government relies in this appeal are not in dispute. For the most part, they are facts found by the district court, and otherwise they are established by uncontradicted evidence consisting of appellees' documents or testimony of their officials.

The case concerns alleged restraint and monopolization of commerce in railroad couplers, the coupler being the device employed to couple railroad cars with each other and with locomotives (fng. 6[3]). It concerns, in particular, restraint and monopolization of the coupler (and its parts) adopted as standard by AAR. This standard coupler is used virtually exclusively on freight cars and it is used on most passenger cars (fng. 13), for the reason, among others, that the railroads' interchange rules, adopted pursuant to their Interchange Agreement, require connecting carriers to accept in interchange only cars equipped with the standard coupler (fng. 11). We therefore first describe the adoption of the standard coupler.

From an early date, one of AAR's objectives has been to promote standards for the construction of railroad cars and their component parts, in order to facilitate exchange of cars between railroads and repair of interchanged cars (fngs. 3, 5). Notwithstanding the requirements of automatic couplers imposed by the Safety Appliance Act of 1893, 45 U. S. C. 2,

[3] We use the designation "fng." to refer to the district court's findings of fact.

there was, prior to 1916, a great diversity of couplers in actual use on railroad cars (fngs. 14–15). In consequence, the railroads had to maintain large inventories of repair parts for the many different types of couplers then in use, and frequently there was improper installation of parts, which endangered train operation and operating crews (fng. 15). Accordingly, in 1912, a special committee of AAR requested the six then existing coupler manufacturers [4] to undertake, in cooperation with AAR, development of a standard coupler (fng. 16). This proposal was carried out, and the result was the adoption by AAR in 1916 of a particular coupler as standard (fngs. 17–18).

As of October 18, 1916, in advance of AAR's adoption of a standard coupler, the coupler manufacturers, except McConway & Torley Corporation,[5] entered into an agreement which extended and supplemented an agreement among the same parties made in July 1915. The agreement, together with the annexed form of

[4] One of the six, The Gould Coupler Company, was merged in 1936 with The Symington Company, to become appellee The Symington-Gould Corporation (fng. 2). Another of the six, Monarch Steel Castings Company, went out of existence when its assets were acquired in 1920 by appellee National Malleable and Steel Castings Company (fng. 16). Our use of the term "defendant manufacturers" embraces these predecessor companies.

[5] McConway objected that the agreement provided for monopolizing trade in couplers, price fixing, patent pooling, and allocation of business, and was clearly illegal (Pl. Ex. 553–447, p. 8). The Board of Trustees nevertheless granted McConway yearly licenses to make and sell standard couplers, and in 1925 McConway became a party to the 1916 agreement made by the other coupler manufacturers (fng. 24).

patent license and price schedule, provided as follows (Pl Ex. 669–A–5): Each party shall designate one of its officers to act as a member of a Board of Trustees. Each party shall convey to the Board, with respect to all patents owned by it which are utilized in the coupler adopted by AAR as standard, exclusive rights for use of such patents in manufacturing the couplers. The Board shall license each party under all patents so conveyed and shall fix the royalty rate, which shall be "nominal". Each license so granted shall specify the licensee's proportion of the total business, which shall be his proportion of total domestic sales in the five-year period 1908–1912, inclusive. The license shall prohibit the licensee from selling at prices and terms other than those specified in the annexed schedule, and shall require the licensee to submit to the Board monthly statements showing all orders taken for couplers and prices and terms of sale.

The annexed price schedule specifies the prices to be charged for couplers and parts thereof from the date of the license to the beginning of the next quarterly period. It provides that the Board, in advance of each new quarterly period, "shall write the Licensee stating the prices which are to be in effect" during the following quarter. On sales for delivery in what came to be known as base territory,[6] the schedule

[6] The schedule defined this territory as constituting the states of Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, New York, Pennsylvania, New Jersey, Delaware, Maryland, Virginia, West Virginia, Kentucky, Ohio, Indiana, Illinois and Michigan (southern peninsula only) and the cities of St. Louis and St. Charles, Missouri, and Bettendorf, Iowa.

prices (or those later fixed by the Board) were to be prices f. o. b. the manufacturer's plant, but he was to make an allowance to the purchaser of the freight at the carload rate from his plant to point of delivery. The same freight allowance was to be made on sales for delivery outside base territory. On these sales, the manufacturer's f. o. b. mill prices were to be the schedule prices (or those fixed by the Board), plus freight at the carload rate from Columbus, Ohio, to point of delivery, less 12½ cents per pound (the manufacturers' current average freight absorption on deliveries in base territory).

Under this pricing scheme, on deliveries both within and without base territory, the delivered cost to the purchaser was the same irrespective of the manufacturer from whom he bought or the location of the manufacturer's plant. This was so because each had the same f. o. b. mill price and each absorbed the freight from his plant to point of delivery. In practice, the Board fixed specific prices for couplers and coupler parts, and these were the prices quoted by all manufacturers for deliveries in base territory. However, determination of the f. o. b. mill price on sales for delivery outside this territory involved additional factors, namely, determination of the freight rate from Columbus to the point of delivery and multiplying the poundage of the coupler by 12½ cents (or such other per pound figure fixed by the Board as representing average freight absorption in base territory). If complete price uniformity was to be achieved, all manufacturers had to make the same adjustment (known as the freight differential) with

respect to any given point of delivery. Accordingly, an employee of National Malleable & Steel Castings Co. ("National") computed the applicable freight differential for hundreds of different delivery points, and all defendant manufacturers used the freight differential list computed by National's employee (Tr. 249–250, 254–255).

The 1916 agreement remained in effect, with minor modifications, until cancelled as of December 31, 1944, because of the defendant manufacturers' growing doubts as to its legality (fng. 41). During the nearly 30 years of the life of this agreement, the Board of Trustees issued licenses only to the defendant manufacturers, and it answered inquiries concerning licensing by stating that it seemed unwise to issue any new license because existing licensees had productive capacity fully equal to probable demand (fng. 74). On cancellation of the agreement, the Board of Trustees reconveyed all unexpired patents to the original grantors, and the Board then dissolved (fng. 41). Prior to the agreement to cancel, the defendant manufacturers had agreed that those who had coupler patents would grant to the others non-exclusive patent licenses covering manufacture and sale of standard couplers (Pl. Ex. 286–1009). Such licenses were in fact granted for a two-year period and have been successively renewed for like periods (fng. 43). The royalty remained nominal (fng. 46)—the combined royalty at first was the pre-1945 rate of 6 cents per coupler and later was .045%, or less than $\frac{1}{20}$ of 1%, of the price of couplers (Tr. 198–200, 1912–1913).

Following termination of the 1916 agreement, the defendant manufacturers continued precisely the same pricing system previously employed. In base territory, which was defined substantially as in the 1916 agreement,[7] the price was f. o. b. the manufacturer's plant with "freight allowed" to delivery point (fng. 53). For deliveries outside base territory, the price was f. o. b. the manufacturer's plant plus the amount of a freight differential computed on a formula designed to reflect the manufacturer's greater absorption of the freight charge from his plant to delivery point as compared with his absorption of freight on deliveries in base territory (*ibid.*).

The f. o. b. mill prices, instead of being fixed by the Board of Trustees, were those announced by National, which prices all of the other manufacturers adopted (fng. 54). Each time National changed its prices, it called some or all of the other manufacturers to advise that a new list was being issued,[8] and it announced its price changes a week or more before the respective effective dates (see, *e. g.*, Pl. Ex. 895–1658; 896–1659; 902–1665; 903–1666) thereby giving the other manufacturers the opportunity, which they embraced, to put the new prices in effect simultaneously with National. The same National employee who had compiled freight differential lists in the Board of Trustees' regime continued to compile

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[7] See National's price list effective March 1, 1948 (Pl. Ex. 901–1664, p. 10), where the territory covered is the same as in the 1916 agreement except for omission of the New England states.

[8] Tr. 202–205, 225, 231, 1218, 1220, 1245, 1621–1623, 1874–1875, 1937–1938; Pl. Ex. 208–704.

freight differential lists, and in computing each list he used as the freight absorption factor a figure given him by an officer of National—a figure necessarily unknown to the other manufacturers (Tr. 249–250, 252–254). These freight differential lists, which the other manufacturers obtained from National (fng. 56), gave the dollar amount which, when added to the mill price, yielded the exact price to be quoted on sales for deliveries at hundreds of different points.[9]

The principal officers of defendant manufacturers, at various meetings which they attended, discussed factors which would affect coupler prices,[10] and on several occasions urged National to increase its prices.[11] National did considerable prior missionary work with customers and competitors prior to shifting, late in 1947, from quotation of firm prices to "prices in effect at time of delivery" (fngs. 62–63). All the other defendant manufacturers adopted this new basis for quoting prices (fng. 64).

The district court found that each other defendant manufacturer, in deciding to follow National's prices, took "unilateral, internal and independent action" (fng. 54); that National never informed the others of what its new prices would be until it had decided this matter for itself (fng. 55); and that the 1947 change in the basis of quoting prices was not the

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[9] National's freight differential list dated February 24, 1947 set forth the freight differentials for 49 points in Texas alone (Pl. Ex. 841–1604, pp. 15–16).

[10] Tr. 228–230, 341–352, 390–391, 446–450, 1243–1245, 1874, 1950.

[11] Tr. 1069, 1243–1245, 1874–1875, 1937–1938; Pl. Ex. 208–704.

result of any understanding, agreement or conspiracy (fng. 64).

The most important feature which distinguishes the standard coupler from the non-standard is that each of its six basic parts can be interchanged with the same part of any other standard coupler regardless of which manufacturer produces the part or the coupler (Tr. 2073, fng. 6, Tr. 609). To achieve this interchangeability, a manufacturer must know the exact dimensions required for each part (Tr. 1320, 2002). Furthermore, he must make the parts within unusually close tolerances, some as close as 1/32 of an inch (fng. 71). National's assistant chief engineer testified (Tr. 2002) that, in order to do this, the manufacturer "must use manufacturing gauges that conform to the standard test gauge[s]."

Access to these standard test (master) gauges and to the required dimensions is within the exclusive control of the defendant manufacturers. Each of them, through its engineering representative, is represented on a body known as the Mechanical Committee of the Standard Coupler Manufacturers (fng. 29). This committee designed and developed the identical (master) gauges (fng. 35), which "were manufactured all at once at the Coupler Pattern Department of National" (Tr. 2004). There is one set of master gauges in each manufacturer's plant (*ibid.*).

The Mechanical Committee also developed drawings (Tr. 594–7) which contain only the dimensions of the standard coupler and the tolerances (Tr. 600, *e. g.*, Pl. Ex. 124–1470) although they are called construction drawings (fng. 36). When they are furnished to

the AAR they are marked "Reproduction or distribution prohibited without authority of Chairman of Mechanical Committee" (*ibid.*).[12] According to the vice-president in charge of engineering of American Steel Foundries (American), the necessary dimensions cannot be ascertained without the construction drawings (Tr. 1320).[13] They cannot be obtained by taking a standard coupler apart (*ibid.*).

The applicable patents on the standard coupler (at least 45 in number) are owned by two of the defendant manufacturers (National and American) (Tr. 1721–6).[14] All of the defendant manufacturers have licenses under all of these patents (*ibid.*). No license to manufacture a standard coupler has ever been issued to anyone other than a defendant manufacturer (fng. 74; Tr. 1954–5, 1335). Although National's vice-president in charge of issuing patent licenses testified that there was no agreement which prevented him from issuing licenses to any qualified applicant (Tr. 1923), and that it was his company's policy to give "serious consideration" to any license application from any qualified applicant (Tr. 1224), neither he nor any other witness testified that any defendant would license every qualified applicant.

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[12] "Inquiries for copies of such drawings received by AAR were answered by referring the inquirer to the defendant manufacturers or their representatives" (fng. 36).

[13] The chairman of the Mechanical Committee also so testified (Tr. 599).

[14] Two of the other defendant manufacturers hold patents on one of the items used in conjunction with the standard coupler, the yoke (Tr. 1721–6).

For standard products other than couplers, AAR attempts to insure that an unpatented article is permitted as an "alternate standard" whenever the "standard" article is patented (Tr. 2242–3). However, when a railroad member of AAR attempted in 1949 to induce it to withhold approval of any more patented improvements to the standard coupler unless the patent owner agreed to license any applicant (Pl. Ex. 106–1372, 107–1374), the proposal was rejected (Pl. Ex. 382–1386, 961–1388, p. 5, items 20 and 21) following circulation among AAR officials of an opposing memorandum supplied by American (Pl. Ex. 43–507, 44–508, 45–509).

THE QUESTIONS ARE SUBSTANTIAL

Prior to 1945 the defendants were unquestionably violating both Section 1 and Section 2 of the Sherman Act. They were parties to an agreement expressly providing for price fixing, allocation of business, and exclusion of others (by virtue of the historical quota provision), pursuant to licensing of pooled patents. The agreement went beyond any immunity from the antitrust laws given by patent rights, and, apart from such immunity, was in clear violation of the Sherman Act.

While *United States* v. *General Electric Co.*, 272 U. S. 476, holds that in some circumstances a patentee is within his patent rights in fixing the price charged for the patented device by licensees of his patent, it is settled that when separate owners of separate patents, by cross licenses or other like arrangements, fix the price to be charged by themselves and by their li-

censees, this merging of the benefits of price fixing under patents is beyond any privilege given by patent statute and runs afoul of the prohibitions of the Sherman Act. *United States* v. *Line Material Co.*, 333 U. S. 287, 312–315; *United States* v. *United States Gypsum Co.*, 333 U. S. 364, 400–401; *United States* v. *United States Gypsum Co.*, 340 U. S. 76, 84–85.

Here, there was not only price fixing and other restraints of trade through the medium of licensing under pooled patents, as condemned in the cases cited above, but, in addition, as in *Gypsum*, defendants' combination brought an entire industry under price control—"all former competitors in an entire industry had acted in concert to restrain commerce in an entire industry under patent licenses in order to organize the industry and stabilize prices." 333 U. S. at 401; 340 U. S. at 84. Accordingly, the district court plainly erred in its finding of fact [*sic*] that the 1916 agreement "did not unreasonably restrain or monopolize trade or commerce, and the licenses issued pursuant to such agreement constituted valid and legal exercise of patent rights" (fng. 25).

The basic question presented by the appeal, therefore, is whether the defendants abandoned their monopolization, conspiracy to monopolize, and conspiracy to eliminate price competition and to sell at uniform prices when they formally abrogated the 1916 agreement.

1. We submit that facts which stand admitted establish that the defendant manufacturers have, since 1945 as before, illegally monopolized trade and commerce in standard couplers and coupler parts.

"Monopoly power is the power to control prices or exclude competition." *United States* v. *DuPont & Co.*, 351 U. S. 377, 391. "[C]ontrol of price or competition established the existence of monopoly power under § 2." *Id.* at 393. In determining whether there is illegal monopolization, the crucial question is whether "power exists to raise prices or to exclude competition when it is desired to do so." *American Tobacco Co.* v. *United States*, 328 U. S. 781, 811. While a monopolist must have "both the power to monopolize, and the intent to monopolize," "specific intent" to monopolize need not be shown, "for no monopolist monopolizes unconscious of what he is doing." *United States* v. *Aluminum Co. of America*, 148 F. 2d 416, 432 (C. A. 2), quoted with approval in *American Tobacco* at p. 814.

Power to exclude others is the necessary effect of defendants' control over, and exclusive retention of, the engineering drawings and related data needed in order to make a standard coupler which meets the required specifications. The fact that no newcomer has entered the industry during a 40-year period tends to confirm existence of power to exclude. And *American Tobacco* directly held that if this power exists, it is immaterial that it has not actually been exercised, *i. e.*, that there has been no overt act of exclusion.

The appeal, therefore, presents the substantial question whether illegal monopolization continues to exist where, despite termination of a formal agreement upon which such monopolization originally rested, the same power over the market continues.

2. We submit that on the admitted facts the defendant manufacturers were engaged in an illegal price-fixing combination. The others have consistently adopted National's prices and related freight differentials. The significance of this action is highlighted by the multitude of individual prices and freight differentials which the others adopted when National changed its price [15] or issued a new freight differential list. Thus, for example, National's price list for couplers and coupler parts, effective March 1, 1948, contains over 200 separate prices, a number of which are less than $1.00 (Pl. Ex. 901–1664), and its freight differential list of February 24, 1947, contains some 2,000 freight differentials (Pl. Ex. 841–1604). What we have, therefore, is participation by the defendant manufacturers in a course of action, common to each of them, the necessary result of which was elimination of all price competition. We submit that under settled principles this constituted illegal price fixing, with the function of price determination tacitly delegated to one of their number. In these circumstances it is no defense that, within the limits of uniform prices, the defendant manufacturers may have actively competed with each other for business.

In *United States* v. *Masonite Corp.*, 316 U. S. 265, 274–276, this Court held that the facts established a price-fixing combination notwithstanding the district court's finding that the defendants had not acted in concert. The Court said that the fact that one com-

[15] National made approximately 13 price changes subsequent to April 8, 1946, the date on which OPA price control terminated (fng. 60).

pany alone fixed the prices, and that the others never consulted with it concerning them, did not make the combination any the less illegal. It said (p. 276): "The fixing of prices by one member of a group, pursuant to express delegation, acquiescence, or understanding, is just as illegal as the fixing of prices by direct, joint action." To the same effect, see *United States* v. *United States Gypsum Co.*, 333 U. S. 364, 394.

In this aspect, the appeal presents the important and substantial problem of distinguishing between principles which the Court applied in *Masonite* and in *Interstate Circuit, Inc.* v. *United States*, 306 U. S. 208, and principles found to be controlling in *Theatre Enterprises, Inc.* v. *Paramount Film Distributing Corp.*, 346 U. S. 537. This delineation should serve as a guide in administration and enforcement of the Sherman Act in many situations, particularly those involving a product which must conform to prescribed standards.

CONCLUSION

The questions presented by this appeal are substantial and of public importance. It is respectfully submitted that probable jurisdiction should be noted.

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JULY 1958.

APPENDIX A

District Court's Opinion

Connell, J.: May it please my brother lawyers: we must first say that we all regret the illness and absence of Mr. Luther Day throughout that part of the trial which ensued after he had to leave us. With due regard to all other great lawyers our State has produced, especially in this area, he is considered, I believe, by our leading lawyers as possibly the greatest trial lawyer in Ohio's history, and it is a matter of great and sincere regret to all of us, I'm sure, that his participation in this trial had to end because of an illness. We hope he is soon back at the trial work he so loves.

Today you will have to be patient with me, for I work throughout from longhand notes, and I do that for your convenience today because quite a few of you have expressed a desire to complete our matter as reasonably early as is possible before the great holiday which approaches. I must say our case terminates today with regret. It will not seem right for those of us who work here every day to get back to just two trial tables and to put the witness back in the right chair, and to operate in your absence, for we have been together for a long time.

I join all other eminent counsel in thanking the reporters who have done a perfect job throughout, and Mr. Rogers, and Messrs. Mancini and Wetherbee, who have helped you get everything you wanted, and Mr. Stevens who kept perfect track of our 2,000 odd exhibits these many weeks. Mr. Stevens' exhibit record was a great convenience to all of us throughout the trial of the case, putting us in a position where we

could instantly recognize, on the part of 30 or 40 men in the room, just exactly which exhibit a lawyer was speaking of.

You have all mentioned the fact that all here sought to make you feel at home. This we did, insofar as I was concerned, because as a lawyer we know from experience what it is to go a long way from home to espouse a cause which may be on the unpopular side, and sometimes against local legal heroes.

As lawyers, we all know and understand exactly what it feels like to walk into a strange court room with a frosty atmosphere, just as surrounded the Prophet Daniel in the Den of Lions, and as lawyers we have all had Daniel's experience that in order to win we had to work from a dietary viewpoint in which cross-examination was our only weapon, and we had to concoct such a dish as would cause our opposition to split asunder.

Every comfort we gave you we owed you. We wanted you to be so comfortable that nothing would interfere with your capacity to fight.

This has indeed been a difficult, lengthy and onerous case. It has kept you professional men quite busy for some years. After you had worked out a timetable between you, you did a splendid job of boiling the case down to its main issues: on agreeing to everything susceptible of agreement; you worked it down to a point where most of the factual situation was not in dispute, except that the Court must decide the motivations behind much of the factual situation, and the intent with which certain acts were and are being done.

You have taken a case which was early anticipated by all to require a year for trial and you have agreed to so much between you that actual trial work will have been less than two months. You have done

such a perfect job of streamlining your case; you have cooperated with the Court and assisted the Court to the fullest possible degree, for which we are grateful indeed. In fact, you cooperated so well that for a short time, at the beginning, the Court did not fully understand the degree to which you had cut down on the work both you and the Court would have to do.

This case was some years in coming to trial. It has been a solid year in immediate preparation by you. You men worked continuously for months on depositions, pleadings, admissions, and other evidentiary agreements between yourselves. All of you supplied me with splendid advance briefs, citing your authorities, and thus gave me ample early time to check them out, for which I am grateful. In fact, I personally feel if those pages that you gentlemen supplied me with were put in one book it would make as fine a textbook on this subject as has ever been written.

On trial you have produced many witnesses and numerous exhibits. We have had approximately 1200 exhibits of plaintiff, some of which are but a page and some of which are leaflets, and records, and some of which are almost books. The defendants have produced approximately 650 exhibits and many witnesses, some of whom had previously been plaintiff's witnesses.

I have had opportunity of looking at these exhibits both during our many weeks of trial and during the intervening days between hearings. I must say that yours has been the best documented lawsuit I have ever seen.

At the outset of trial, we seemed to get a slow start. At first I misunderstood plaintiff's counsel's method of introducing his exhibits. It is the rule

that exhibits should be inquired of and qualified before being offered, but here counsel seemed to be offering them before qualifying them. I didn't at first quite appreciate how much of my work you men had arranged to do for me in advance.

Later counsel for plaintiff was being so meticulously careful as he initiated his inquiries that our case seemed to be going too slowly. Then defense counsel indicated they did not desire to be too technical; and after we got past those first roadblocks at times plaintiff's counsel moved so rapidly that it was difficult for the defense to keep up with him.

May I at this point thank all counsel for their courtesy, their efficiency, their hard work, their patience, and I am grateful too for the brotherly and kindly spirit in which you men all fought with each other so hard, so fairly, and so zealously, as you presented your respective contentions. I have never been in a lawsuit where men lived together with each other in the court room so long and fought so valiantly and kept their amiability so well. You have all had a difficult case here. It represents four and a half years of hard work by all, and it includes many months of immediate and intensive preparation.

It is too bad that after such mutual and joint efforts on the part of such splendid trial men anybody must be on the losing side. But such is the ultimate in the life of every lawyer now and then.

Now for the case. Ours is fundamentally an injunction question. Your pleadings boiled down to your opening statements. I will now cover those.

It is here claimed by the plaintiff that these defendants are in active violation of law; that they currently combine to accomplish an unlawful purpose; that they restrain trade by fixing prices, by dividing business, by holding down the less powerful members within

their group, and by permitting no others to join their group.

It is further claimed that such conspiracy has existed for over four decades. That prices were set in an agreement going back to 1916. That the exchange of cost information between cost accountants employed by defendants was part of the combination. That their engineers met as a Mechanical Committee to make certain improper decisions also considered unlawful.

It is further claimed by plaintiff that defendants operated this combination through the instrumentality of a Board of Trustees from 1916 to 1945, which it then dissolved because, plaintiff claims, defendants knew it to have been unlawful.

The plaintiff further claims that defendant The Association of American Railroads was a part of this unlawful combination. That they took no safeguards to prevent these alleged illegal acts and results of other defendants.

In opening statement, plaintiff said it would offer some 50 witnesses and 1200 exhibits to prove its case; that the combination to fix prices continues to date; that the business is allocated to date; and that patents are maintained to exclude others to date; that, in effect, the aid of this Court should be invoked to enjoin this current illegal combination. Counsel for plaintiff said it would have a circumstantial case as to these defendants, and that it would not prove its case by direct evidence.

In its opening statement, it is here claimed by defendant National, meaning National Malleable & Steel Castings Company, that no such condition now exists which could be properly susceptible of injunction. They rely particularly on the authority of the case

of United States v. The Oregon Medical Society reported in 343 U. S. 326, in the year 1952.

Defendant National says it is violating no law; that it does have patents, and properly so; and that it has joined with others to give the country the most safe and efficient coupler; that it did operate under an agreement, and did use a Board of Trustees between 1916 and 1944 when, by reason of what appeared to be possible changing thought on the subject of its legality, the Board dissolved itself.

National says the 1916 agreement was lawful throughout its entire existence; that the best available counsel, including a former United States Attorney General, so instructed them.

Counsel for National denies they were in a patent pool. Counsel says the Justice Department investigated this entire matter in 1932 and found nothing illegal about it at that time.

Counsel says each defendant got all the work it could; that customers were not divided; that there was no price-fixing.

Counsel says that between November 15, 1944, and April 6, 1946, the OPA was in effect, and that between January 26, 1950 and February 12, 1953, the OPS was in effect, which brought Governmental control of the situation down to a time just three months before the within case was filed.

Counsel says National made the decision to determine its own prices on couplers; that others would adopt similar prices. Counsel says such prices were based on its own business judgment, and never were based on any agreement with anybody else; that uniform prices are due to economic and business reasons, and are not the result of any illegal agreement.

In his opening statement, counsel for American Steel Foundries suggested that the plaintiff had the

burden of establishing a present threat to violate the law today. Counsel further said that as to the uniformity of prices others follow the prices set by National on couplers, as they follow the prices by National on freight differentials.

Counsel said allocations of business were made before 1945, but never since, and that today each defendant goes after all the business he can get.

Without too much repetition, may I say that counsel for Buckeye stated that they sell all they can, as did counsel for Symington-Gould.

Counsel for McConway & Torley said the same, and added that patentors should be encouraged so that the public gets the greatest amount of benefit from their work. Counsel also related that in 1893 the law required automatic couplers; that the results achieved by the manufacturers in order to comply with the Government's suggestion resulted in the saving of lives and property, and in the expedition of passenger and freight travel; that such result was possible only by team-work and cooperation on the part of all concerned, for the benefit of the entire nation.

Counsel for the Association of American Railroads stated that his clients are purchasers and users of the products involved. He stated his clients are really being accused here of raising prices on parts which they would have to pay. He stated that the standard coupler was the result of the cooperation of all, and stated that the AAR was no part of the 1916 agreement, nor did it know of its 1945 dissolution until three years after it happened.

The plaintiff has here presented its circumstantial case against defendants on the question of fixing prices, dividing business and controlling who can get into this business, and defendants have here presented their defense consisting of their refutation and ex-

planation of the circumstances claimed by plaintiff, and by eliciting the direct and positive testimony of all witnesses so concerned to the effect that there was never any combination amongst them to do anything unlawful.

We shall, of course, make no effort to review the testimony. We have listened to many witnesses on both sides. They were generally the executives and representatives of the defendant companies. They were all accomplished and honorable professional men. Many of them were self-made. Many started at the bottom. They all seemed to me to be honest, hard-working engineers and executives.

The original accomplishment of these defendant companies was unquestionably a boon to this country. To follow the Government's suggestion, they got together with all the genius they could muster, and produced the standard coupler. They made the American Railway the world's best, and they made American products the best in their field.

Their information had to be channeled through some kind of a clearing-house. They had to use such a means to assemble and perfect their finished product, as otherwise it could never have been, in all probability, produced. Their method of conducing to the country's safety met with universal success. Their lawyers assured them their method was legal, and one of these opinions came from a former Attorney General of these United States. They say that the Government checked them out and found no complaint.

But times change, and from their viewpoint it seems that, as they regarded it, legal thinking changed; and fear of such change caused them in 1944 to discontinue operating under the 1916 agreement.

After such discontinuance they, nevertheless, all continued thereafter, and up to date, to manufacture their products. Each continued to use all of the facilities for manufacture which it already had; each continued to utilize the full manufacturing capacity which it already had; each continued to do so up to this very date.

Meanwhile, Government price-fixing intervened during most of the time which has since elapsed, and was discontinued just three months before this and the criminal case, which has been here mentioned, were filed.

I think it is fair for me to say that I am one of the few people in this court room who ante-date the history of this lawsuit. I do believe that the standard coupler was a boon to our civilization. For one thing, although it is no part of this record, I can remember when our city, which was then something of a railroad city, I can remember when all the trains were on the ground and none elevated. We had a lot of men around who had lost arms and legs by the old couplers. Such amputees were noticeable when I was young. Everybody knew a few men who had been crippled in that way.

All of you Cleveland lawyers in the room will remember a splendid municipal judge who died not so long ago, David Moylan, who lost both of his arms to couplers. While it is no part of this record, it is worthy of mention, the way he overcame his handicaps as a student, as a lawyer, and as a judge, made the local lawyers ever conscious, not only of what couplers could do to a man but equally conscious of what men could do to overcome what couplers had done to men.

I can remember when there were a lot of coupler lawsuits both in this United States Court and in our

local Common Pleas Court. But in my sixteen years on the bench I have never seen one. That type of human misery seems to have quite come to its end. And while ours is the profession which theorizes on how to end human misery, it is fair to say that there can be no question here but that the engineering genius we have herein observed in this very court room is accountable for this particular improvement.

At the outset here, as we have said, plaintiff's counsel informed us that theirs was a circumstantial case. Plaintiff has here undertaken to forge a chain of circumstances against these defendants, and there here appeared to be certain circumstances in plaintiff's favor, which I will list as follows, much as they have listed them:

First, the fact that for nearly 30 years defendants operated under a Trust Agreement fixing prices and allocating business;

Secondly, the fact that prices are quite uniform today;

Thirdly, the fact that a Mechanical Committee, as has been utilized in the past, is still utilized today;

Fourth, the fact that these defendants reveal costs to each other today and visit each other's plants today;

The fact that no new capital in some 30 to 40 years has ventured into the business;

The alleged improper retention of control over their patents.

Now, may I observe at this point, to digress a moment, please, that when Mr. Victor DeMarco started in with his argument he made reference to the cases he had to try in the prosecutor's office and said that cases often became much simpler than they at first blush appeared. That may well be. I once heard one of the partners of the partnership of which he and

Mr. Kerr and Mr. Williams are members here, I once heard one of their partners, Mr. Patrick Mulligan, one of our greatest trial lawyers, say that a murder case was really an assault and battery case in which the victim died.

The within case is really a case in conspiracy, if there be a case, and a conspiracy whether to rob a bank in fifty seconds or to violate the Sherman Act over a continuous period of 50 years, such conspiracies are provable in exactly the same way. So that even this case may be simpler than appeared at first blush, as has been said.

This is, as we have said, an injunction case, and the law of injunction applies. So we are here concerned with that alleged conduct now going on, improperly, the continuance of which improper conduct ought to be prevented and stopped by injunction, according to the plaintiff's theory of the case. So there must here be that improper conduct which is susceptible of injunction for the plaintiff to prevail, and the thing enjoined must be happening as of the present moment, or likely to happen in the immediate future.

Plaintiff claims there is going on at this moment, and likely to go on in the immediate future, a course of conduct on the part of all defendants which is most improper; that such defendants are in an illegal conspiracy and combination to restrain trade in interstate commerce in violation of law, and that such illegal combination has been actively violating federal laws for four or five decades.

The plaintiff's claim herein is a most serious accusation. If it is true, then the department of the Government which examined into the question on several occasions should have brought this action long ago. If it is true, it is regrettable indeed that the Govern-

ment for some years under OPA and some years under OPS, consciously or unconsciously, conduced to the evil when it exercised full control over the situation. If it is true, this action and the remedy sought is long overdue.

Now, just what is before us to prove that it is true? Well, counsel told us at the outset of the case that he was going to present here what he called a circumstantial case; that he was going to prove this active present conspiracy by a chain of circumstances. And the presentation plaintiff has made has been entirely one of circumstance alone, for no witness they have produced here has said there was ever any illegal combination. In fact, every witness who was asked—and they were all plaintiff's witnesses, and then many of them thereafter became defense witnesses—but every witness who was asked testified directly and positively to the contrary. The only one who says there is any illegal combination is plaintiff's counsel himself, and he bases his statement solely and only on the circumstances he has offered.

There have been in the case on the side of both plaintiff and defendants many circumstances which may have a tendency both to prove and to disprove plaintiff's claim. And our ultimate findings must necessarily here be based on such circumstantial evidence both ways, and on the direct and positive evidence of the witnesses who have testified before us.

Our findings of fact and conclusions of law we will herein give you verbally, leaving to counsel the task of later translating the same into appropriate written form.

Since this is an injunction case, we might well have limited the evidence to that which has happened since December of 1944, because a 13-year period ought to have been sufficient to prove a current conspiracy, if

one exists, but we have permitted the plaintiff to go back beyond the Trust Agreement of 1916 which was dissolved in December, 1944, and into some events of decades previous to that, for the purposes of showing plaintiff's claims as to the motivations, alleged illegalities, the intentions with which certain wrongs were done, habit patterns, etc., all with a view to throwing light on the current situation which plaintiff claims is here susceptible of injunction and concerning which plaintiff claims that the people of these United States cannot be otherwise protected from this 40- to 60-year-old illegal combination.

Now we come to the first circumstance having to do with the 1916 Trust Agreement. There is no question but that the operation of this industry was conducted completely under a Trust Agreement from 1916 to 1945. It seems to have been a necessary concomitant to the production of the device which America so needed at that time. Men gave up rights for the common good; they joined together and fought a little war to save arms, legs, lives, and freight and time. They had to invent instrumentalities for that purpose, as men first invented legal entities for other purposes. They had to create a clearing-house of genius and ideas and patents and parts.

They were successful beyond expectation. And at the time the country and the world acclaimed their end result.

As to the Trust Agreement of 1916, as of the date it was made I see no illegality in it then, and since 1945 no court has ever found it to be illegal. Nor do I. Nor do I believe in the correctness of plaintiff's theory that it ended only in its outward manifestations, because the provable outward manifestations, which seem to be quite immune from plaintiff's attack, namely, the graphs which are here in the form

of exhibits in evidence, and from which I will later quote—these graphs prove without any refutation whatsoever that from 1945 to date there has been a veritable, if I may use a colloquial expression, a veritable "cat and dog fight" between these defendants to get all the business away from each other that they can.

What these manufacturers did before 1916 was unique in the history of patents and inventions. For the benefit of the entire country they so gave up their exclusive rights for the use of each other as to make it possible for the development of their ultimate mechanical masterpiece.

If they didn't have this team-work for the benefit of our people, they might still be fighting over patent differences, and we might never have perfected a standard interchangeable coupler.

I can see no legal wrong in their method of mutual sacrifice of patent rights to attain this end. I find their intentions to have been perfectly lawful. I think the contention that their intentions were then improper is an unreasonable contention.

I agree with Jim Davis that to prevail the Government must here prove some cognizable danger of recurrent violation on the part of the defendants, which he quoted from a United States Supreme Court citation.

Now, here the plaintiff has said the defendants can present a legal justification for every act they have done singly—or that was the way I understood Mr. Bernstein to have said, and that's the way the defense understood him to have said, and then he added that considered together they become illegal. Perhaps I should withdraw that because of what Mr. Bernstein later said.

The plaintiff claims they prove a conspiracy between 1916 and 1945 here. Mr. Davis says, and I

agree with him, that if they have so proved a conspiracy between 1916 and 1945, they have equally proved, on the part of the plaintiff, that it was completely terminated in 1945.

The plaintiff claims other practices here ensued which constituted a continuance of the conspiracy they claimed. They claim that the agreement ended only in its outward manifestations. The evidence before us contravenes the claim. On the one side we have that accusation. On the other side we have the compilations which were translated into graphs which showed exactly what happened in this business after 1945. Some of this evidence came from the plaintiff.

The evidence introduced by the plaintiff proves that American, a big company, whose quota in 1944 was 20.54 percent has averaged 18 percent from 1945 through 1956. They went down 2 percent from their old quota, while Buckeye, a little company with a quota of 13.41 percent averaged 15 percent. They went up the equivalent of the loss of the big company. Symington-Gould, with a quota of 11.68 percent, averaged 14 percent—up 3 points. And this percentage is a percentage with reference to the entire business of all the coupler manufacturers in the United States. So that when Symington-Gould, for instance, goes up 3 percent of all the business in the United States, its own business may be increased 10 or 12 percent.

McConway & Torley had a quota of 10 percent in the old days and averaged 13 percent ever since. National Malleable's quota which had been 44.37 percent has averaged 40 percent ever since. So that loss of 5 percent of the total business of all coupler manufacturers, that 5 percent of all the business, might very well be 10 or 12 or 15 or 20 percent of their own business. These are percentages of a total of 100

percent of all business of all companies. As to each individual company each of these percents would average a higher percent of that company's total business. National's annual fluctuations run from 37 percent to 42 percent. But this 5 percent fluctuation of all business would be one-seventh to one-eighth of their own total, which would be 14 percent to 12½ percent.

Thus McConway & Torley, which was once on a 10 percent quota up to 1945, ran in the following years immediately thereafter, 16 percent, 12.51, 13.78, 13.89, 15.94, and so on. And this percentage of all business would rate a far higher percent of its own individual business.

Symington-Gould's quota of 11.68 has since gone to 18.23 percent, and has averaged 14.5 percent over the period of the last 12 years.

It is the claim of the plaintiff that the little companies were being bullied here, the big companies told them what to do. But, strangely, from the figures which have been compiled—there is no dispute on it, there is no claim they aren't true, not a question was asked about them, and plaintiff ignores the subject completely throughout two full days of argument—but, nevertheless, the little companies which are theoretically bullied here under the plaintiff's contention have had all the increase in business at the expense of the larger companies which, under plaintiff's theory of the case, have been doing the bullying.

None of this information is questioned. None of this evidence is rebutted. There is no question about its mathematical certainty whatsoever, and these figures, and other figures which I will later on mention, completely disprove the premise on which plaintiff bases all its claims as to quota-allocation.

For instance, on bodies Buckeye's 1944 quota was 13.41 percent, and in 1957 it became 42.5 percent. On knuckles Buckeye's quota was 13.41 percent, and in 1952 it became 42.5 percent. They multiplied their business three times over.

As I find with reference to quotas, so it may be said, from one end to the other in this case, that one must always measure what is claimed by plaintiff to have theoretically happened against what is mathematically proved by defendants to have actually happened. When the issues can be so squarely met by proof to mathematical certainties, our task becomes less difficult than as it first appeared.

Now we come to the second circumstance, uniform prices, and we will go to the other graphs which prove what a lively battle has been going on here since 1945. The glaring circumstances from end to end of the case seems to be the claim that prices are uniform, and business is allocated, and the combination is so satisfied that there is a complete lack of any healthy competition among these conspirators.

The real complaint of plaintiff's counsel is that they are doing so well as the result of their conspiracy that they don't have to fight with each other. The theory is that business has been so good for 40 years, due to their successful violation of the law, that the spirit of competition between them, so necessary to the country's well-being, is dead.

What do we find in the evidence? Let's at first ignore animate witnesses, for all animate witnesses testified positively and directly to the opposite of plaintiff's claim here. There is no question where the animate witnesses stand—and all were plaintiff's witnesses, and many were defendant's witnesses.

Let us look to a few inanimate witnesses which completely disprove plaintiff's claims in this respect—

witnesses which have in no wise been refuted—witnesses which have been meticulously ignored and avoided by plaintiff in all argument.

I refer particularly to ASF Exhibit 66–165–A, and National Malleable's Exhibit 301, and Buckeye's Exhibits 383 and 384. These exhibits prove what happened to all this business from 1945 to the present date.

This exhibit, ASF Exhibit 66 165–A, is worthy of comment. It covers 100 percent, or the total business of all involved. It shows that on the Type E couplers between 1954 and 1957 National's business is down 5 percent—not just 5 percent or one-twentieth of National's own business, but 5 percent of the total business done by all. In business that is a terrific cut.

I cannot believe that this is the result of any agreement between them, because no one would ever agree to lose that much.

At the same time ASF went up 4 percent. So they got 80 percent of National's loss. Now, ASF might like that, but National wouldn't like it.

Buckeye picks up 6 percent between 1954 and 1955; McConway & Torley went down 6 percent from 1956 to June of 1957. It looks like Buckeye got what McConway & Torley lost.

It seems to me results like these, and compilations like these, and mathematical certainties like these, talk louder than the accusations.

Again, in 1948 National had 42½ percent of all business in E couplers, new equipment, repair and maintenance sales, and in June, 1957, they were down to 35 percent of all business. This is a terrific drop because that 7½ percent loss of the total of all business done by all constitutes a reduction in National's own business of a little more than a 19 percent loss of National's own business. And Symington-Gould

and American Steel Foundries gained nearly all of National's loss.

I cannot believe these losses and deficiencies are the result of any deliberate scheming, conspiracy and combination of the manufacturers, to violate the law, but I believe this is the result of natural competition, and not the result of unnatural or unlawful combination.

At the same time Buckeye's gain was approximately equal to McConway & Torley's loss. This does not look to me, gentlemen, as if the lions and lambs lay down together. It has more the appearance of what is colloquially called a cat and dog fight, for business and survival.

Every defendant is out to get all the business he can get. They have all so sworn, and the mathematical certainties prove it. And the way their businesses have gone up and down—and there is only 100 percent to fight about—the so-called largest operator loses close to 20 percent on a gradual 9-year decline. I think human nature is such that no such loss would ever be suffered by it as a result of an unlawful combination. They lost 20 percent because they had more competition than they or anybody else ever bargained for.

This doesn't sound like a situation to me in which a group of men got together and agreed not to fight. It looks to me as if the only way in which it could be fairly said that they sought to allocate work was by giving everybody the same chance to fight for it. So much for the fight on the Type E couplers.

Another graph, National Malleable's Exhibit 301, showed National's participation in the sale of all railroad specialties, which includes couplers and everything else it sells. In 1936 National had 12 percent of all such business. In 1939 it moves up to 19½

percent. In 1941 it went down to 14 percent. Nine years later it was 15 percent. And in 1956 it got back to 20 percent, approximately where it had been 20 years before, in 1936.

Such fluctuations in these percentages, which refer to the total of all the country's business, indicate, as I see it, such variations as constitute a refuting circumstance to the claim that there is here an unlawful combination by which National or any other defendant here seeks, gets or controls such particular quantity of business as is unfair or unjust to the people of these United States.

The fact is that the country gets that benefit which inures as the result of the increasing effort of these defendants to get all the business they can away from each other.

Note, gentlemen, these figures and percentages appearing on these graphs were not attacked or rebutted in any manner whatsoever by plaintiff. I take it they are correct and true in every detail.

Buckeye's Exhibits 383 and 384 give us information on changes in the number of customers to whom they sell. The customers necessarily must be railroads. They have no other customers.

Now, the AAR has 110 Class 1 members, meaning Class 1 railroads, meaning railroads with a gross of over $3,000,000 a year, and 160 associate railroads which are not in Class 1. So the number of prospective customers involved here is always limited to a possible 270.

Buckeye's graph, in Exhibit 283, indicates that between 1940 and 1957 Buckeye had 110 specific customers, and that in the 1940–1944 period, under the Board of Trustees operation, they had 37 other customers whom it later lost. Those customers ceased to buy from Buckeye after 1944.

On the other hand, after the Board of Trustees dissolved, and between 1945 and 1957, Buckeye picked up 138 customers which it never had before. Considering how few prospects there are, this looks like natural competition to me. There were 270 possible customers and Buckeye picked up 138 new ones—over half of all possible prospects. I find that to be very spirited competition.

Buckeye's Exhibit 383 shows that after the 1944 dissolution Buckeye went out and gained 138 new customers and, at the same time, lost 37 of their old customers. Therefore they have a net gain of 101 customers when there were only 270 possible customers to solicit. In other words, they got more than one-third of all customers from all sources, which were also sources for the other defendants. This proves the fallacy of the claim that there is no competition here.

It did not have a proportionate increase in business, but this does prove it is highly competitive, that there is turmoil and change, that nobody lays down on the job, and there is a very sincere fight to get everybody else's customers.

Buckeye's Exhibit 384 shows, by graph, the years in which these new customers for couplers and parts were acquired between 1945 and 1957. In 1945 they picked up eleven; in 1946 they picked up eighteen; 1947 they picked up seventeen; in 1948, seventeen; in 1949, nine; in 1950, seven; in 1951, ten; in 1952, eight; in 1953, six; in 1954, eight; in 1955, eleven; in 1956, eight; and in 1957 so far, eight, for a total of 138 all out of the same 270, or more than half.

Again considering how few the prospects are this indicates that Buckeye is no more satisfied with the status quo than are its competitors. Each fights for every customer and every sale. This circumstance, so

proved by these graphs, is another proof that the industry is one of ceaseless competition and not one of planned limitation.

O'Kane of Buckeye said that since 1945 they went after all the customers they could get and their coupler customers almost doubled.

To increase one's business in this industry does not mean one creates business which did not exist before. It means you must take it away from somebody else. There is only 100 percent of the business and it is limited to railroads only, and no salesman creates any new prospects. Sales ability constructs no new railroads. You have to fight for what there is. They all have to fight to get all they can from the other fellow and to hang on to what they have, and the fluctuations of sales and production in all these defendant companies proves that they are competing to the best of their capacity and illegally agreeing not at all.

Buckeye's counsel says they followed National prices; that they are constrained to do so because couplers are exactly alike and completely interchangeable and fungible. All must go to the same small group of customers represented by astute purchasing agents. They know a small company can't get more money for the same thing than a large one. They followed National's prices but couldn't learn them until they were published. Moriarty never told them until he told the world. That was the plaintiff's proof, and I believe it, and I find that the parallelism of action here which plaintiff construes as constituting proof of an implied conspiracy here is really the result of a strong and informed competition.

Now, Mr. Suttie testified, he being an officer of the American Steel Foundries, that after the United States decontrolled, and OPS ended, he published his price list in the Chicago Journal of Commerce. To

me, that is pretty fair evidence of a company's willingness to tell the world what its prices are. He also related that Moriarty told him that he, Suttie, was getting too much business, and he told Moriarty his superiors told him to get all the coupler business he could, and that that was what he was trying to do.

O'Kane of Buckeye said he was trying to get all the business he could and that the number of his customers had doubled since the dissolution of the agreement.

What Suttie and O'Kane said was amply factually demonstrated by ASF Exhibit 66–165A, and Buckeye's Exhibits 383 and 384, which we have previously discussed, all of which, by animate and inanimate witnesses, demonstrates that prices herein were the result of legal competition and not of illegal lack of competition.

Another circumstance here which cuts both ways, these exhibits which prove rather fierce competition since 1945, prove equally well the plaintiff's contention that there wasn't any competition before 1945.

So my question still is: what misconduct obtains and exists today susceptible of and requiring an injunction?

Now, there were some animate witnesses on price-fixing, too, and all animate witnesses testified there was never a conspiracy or combination here or any agreement to fix prices.

It may be ever natural for the accused to deny a charge against him; it may even accord with their instinct of self-defense. We have all observed that as lawyers. But it seems to me these were intelligent, educated, honorable professional men, these were men to whom dishonesty in a court room would be as alien as a deliberately false reading from one of their own slide rules. To me they tell a completely honest story

of their businesses, and of the events with which we are here concerned.

I have often heard lawyers and doctors testify. I never heard testimony any more exact or cogent or correct than theirs seemed to be. And since Moriarty of National takes all responsibility of the alleged fixing of prices on couplers which he originates and which others imitate, we will consider Moriarty first.

I believe his testimony that prices went up and down from year to year, depending upon conditions. Prices are increasing on everything else. Why shouldn't they on couplers?

I believe that until he made up his own mind he did not tell his prices to anybody, as he testified, and that after that he told the world he sent copies to customers and to the public, including even his competition, as a matter of courtesy and convenience. And I think from observing him he would be courteous to anyone, even a competitor.

I believe others followed his prices, as they have testified. I believe they couldn't charge more for the same exact thing and get the business at all; that they couldn't charge less and get the business because National would have to meet their competition if they did so.

I believe in the three-month interval between OPS and the filing of this petition that it was perfectly natural for all defendants to continue to follow the uniform prices theretofore obtaining under Government control.

Mr. Moriarty testified that in his company he had complete jurisdiction in pricing; that he did not confer with any of his competition on prices; he did not even confer within his own plant, except to get the data which he needed to set a price. He assumes entire responsibility for prices. He has never had any

agreement with anybody on prices. When the OPS authorized a 5 percent increase he refused to follow their suggestion because, as he testified, he couldn't justify their suggestion by his costs. That sounds like an unusually honest and honorable gentleman to me.

When he says he set his own prices I believe him. And when others say they follow his prices as a matter of uniformity because they can't make the same identical thing he makes any cheaper than he can make it, I believe them.

I think we are here dealing strictly with the law of supply and demand, the mathematics of costs and the vagaries of economics, and it is difficult for me to see wherein any of these natural results can be properly considered as susceptible of injunction.

On the other hand, when others put their prices below Moriarty's, he always followed the lowest price to meet the competition. What other method could he or they or anyone else use? He gathers together all the data he needs and he alone decides the price. And because of the position his company occupies in the field others imitate that price. It is sent to all their customers. They send it as a matter of courtesy and convenience to anybody who wants it, including competition and everybody else. Others, for the reasons given here in their testimony, as far as couplers are concerned, follow the leader, National Malleable. They all sell the same identical thing.

To me it seems a perfectly natural thing that they do so. And, indeed, from their testimony what else could they do, since they must meet their competition?

I believe nobody here conspired or combined or agreed to do anything unlawful. I believe we can't enjoin Moriarty from thinking, from figuring out what the cost ought to be based on, economic, business

conditions, changing labor costs, changing commodity costs, and other data he described. We can't enjoin nature, which so operates when an article is offered for sale that whoever else offers the same thing is in a position where he can't charge much more. You can't enjoin supply and demand.

You can enjoin only such wrong as is susceptible of injunction. I think similarity or uniformity of price here has come about in a purely natural way, not the result of any combination, but the result of intense competition.

What happened in the business, as some took business away from the others, and lost it in turn, proves that. I believe the testimony of the men who said they fight for business because the business in its ups and downs, from these exhibits, proves exactly what they say.

Now Emerson once said that "What you are talks louder than anything you can say." Here the changing course of business, the way some take business away from others, the way sales go up and sales go down, the graphs which prove the degree of change, all of this talks louder and more convincingly to the effect that there is a healthy competition here and everybody is getting all the sales he can.

These facts and this evidence in exhibit form talk louder against the theory of illegal combination than do the suspicions of plaintiff's counsel or any contrary evidence which plaintiff has produced. In fact, to the evidence which I have mentioned plaintiff produced no rebutting testimony at all.

And not only do the changes in their sales so prove by circumstance that there is here no illegal combination or agreement, but every witness in the case who was inquired of on the subject without any exception so directly testified. Some witnesses testified they

would learn from their customers if National had put out a new price list and they would then call or write National to get one.

I see no impropriety in that.

Mr. Suttie of American Steel Foundries said he had to follow National's prices because the parts were all to exactly the same specifications and of the same standard quality so that no railroad would pay any other price for the same identical thing. The only difference was the imprint, the name plate on the parts.

His testimony and his reasoning sounds very cogent to me. It lends credence to the defense that prices are a matter of economics and competition resulting in a price to the public which is the result of the law of supply and demand and not the result of an unlawful combination.

It is claimed here that there is today allocation of customers. I think each defendant gets all the customers and all the business he can. The graphs which we have mentioned so prove.

I find no convincing evidence on this subject of either quotas or allocations. The chart compilations here are irrefutable. Of course, they contain only that period of time after 1945. Plaintiff made no effort to meet this evidence. Plaintiff in argument ignored this evidence.

When I consider the preeminent capacities of plaintiff's lawyers as they have so well demonstrated throughout these weeks, I believe they stayed away from the subject because they realized that this feature of the defense is absolutely true.

I find it true. I find that since January 1st, 1945 all of these defendants have been making every effort to hold and get customers and to take them away from each other because there is no other business to get.

What business there is contracts and there are no future possibilities of expansion in this business. One is limited to what he can take away from somebody else.

The third circumstance here is the Mechanical Committee, and it is suggested that its activities are circumstances here proving an illegal combination.

Mr. Kerr for the defendants said that the Mechanical Committee serves a useful and lawful purpose. I believe it does.

Its work is scientific and mathematical and precise. I do believe patent or legal considerations have no influence whatsoever on what these precise scientific engineers do in their work. Theirs is an exact science.

They were criticised a little bit here for having read the reports of the United States Supreme Court, but I do not believe that such reading had any deleterious bearing on the work they do, nor any insincere connotation in its having been read.

From my observation of these men, I do not believe any consideration would cause them ever to produce any device but the best they could put together. I do not believe they would tolerate or permit any perversion of their art for any unlawful purpose such as would endanger the men who couple trains or those who ride them.

As to the Mechanical Committee's holding its own drawings and gages and the claim of their denying others access thereto, I do believe that whatever was done in this respect was done in the interest of standardization and in the interest of protecting standardization and in the interest of the safety of passengers and crews on trains.

I agree that standardization is necessary to prevent the manufacture of obsolete or inadequate parts which

would endanger those who ride and those who work that others may ride.

Plaintiff's counsel suggests there is some illegality in the way in which the Mechanical Committee holds onto its drawings and gages; that this sort of secrecy indicates some unlawfuness in the way it retains its own property. Plaintiff's counsel is under the impression that the duplication of this coupler would be a prodigious and impossible task, and that it would be a terrible injustice if a prospect who wanted to get into this business had to go to some one of these defendants or the Mechanical Committee with his hat in his hand and ask, "How to make this thing", as counsel says.

What a catastrophe that if he wants something that somebody else now has as the result of that person's own creation, that he should have to ask his so-called competitor for it. Obviously if the defendants are his competitors, they have no way of knowing it as yet, have they? And the fact that he must ask is in itself a violation, plaintiff suggests.

Just what must manufacturers do to keep within the law? Must they go around with their drawings in their hand offering them to those who might possibly be enticed into becoming their competitors? Is it wrong to create something and to possess it and to wait for someone who did none of the work to ask for it? And if you want something that belongs to somebody else, because he put it all together, and you didn't put any of it together, were we not told long ago to "ask and we shall receive"? And whether one's hat is in his hand or not, it seems to me it is more just to tell one man to go through the red tape of speaking up for himself than it is to make a criminal out of one who didn't give up his possession because a prospective manufacturer who doesn't yet exist—accord-

ing to the testimony in the case to date—has coveted his neighbor's goods and is willing to take them but is not willing to go through the indignity of asking for them.

It is my impression from what I have heard here that these defendants do a beautiful job mechanically of casting their parts, because to cast something means to throw—like casting a die or casting a fishing net. And in the early days they threw or dropped the hot metal into molds wherein patterns had once been placed to form an emptiness or vacuum, and after the metal cooled they then removed the sand from the box and they had a little piece of cast iron conformed to the hole in the sand which had been put there by a pattern.

You all know the calibrations on a one-inch ruler, the twelve little parts that go to make an inch. These men have mastered their art by their genius to the point they cast or throw their hot metal into a receptacle of some kind and it emerges to within one thirty-sixth of an inch, to a point where it takes no machining to complete the article.

The little machine that we had in here, the little coupler that we had in here looked very pretty and it was intended to look pretty. When you fellows are going home on the railroads tonight, take a look at the freight train on the adjoining track and look at the couplers. You won't find any of them shined up.

What a job to make these parts to within one thirty-sixth of an inch by casting. And it comes out so perfectly it doesn't require machining and it never requires lubrication. It works till it wears out. Who could improve on that?

You lawyers who work in Cleveland are well aware that this is a machine shop city, a city of toolmakers

and gage makers. We make the tools which make the tools. But whenever we get a thousandth of an inch on a part, it takes machines. Our more precise work is in ten-thousandths.

I have seen a piece of steel expand a certain number of millionths of an inch when I tapped it with my forefinger because one-twentieth of a second of the heat from your forefinger can cause a piece of metal to expand a millionth of an inch. We have machines around here which so record.

What a wonderful thing that these people can turn out their product just in the form of a cast or casting. One wonders how any of us could improve on their work.

The more I hear about the Mechanical Committee, gentlemen, the more I marvel at the perfection of its productions.

Now as to the ircumstance of reciprocally revealing costs and of plant visits and royalties.

If there were no competiton between these defendants such as has been well and mathematically proven, I could understand the suspicions of plaintiff's counsel on these subjects. But as long as they are all giving each other a well-proved battle royal to take each other's customers away from the other fellow as well as they can, I see no legal harm in their fraternizations.

There was lots of visiting back and forth here. Engineers do it, just like bar associations, just like visiting lawyers and judges.

It seemed to me that the men who did the visiting gave far more cogent and logical reasons for it, and reasons far more true than the suggestion that it was all part of an illicit combination. They went to see new furnaces, new processes, new methods, and they went to many foundries belonging to many corpora-

tions other than these particular half dozen defendant companies.

When you listen to these highly-educated and trained engineers explaining their purposes and the benefits they or their companies derive in thus learning from others, the suggestion that it is all to facilitate a 40-year-old conspiracy becomes most untenable. Indeed, instead of a circumstance tending to prove guilt, it proves the contrary.

I don't believe or find that these defendants reciprocated cost information to get prices up, as part of an illegal combination at all. I think they did it to check costs with each other so that they could get their costs down.

I believe the evidence so shows. There was no chance to get labor and material costs down, so they checked costs with each other to see what else they could get down, and they gave pertinent examples of it to me. I find that plant visitation was all for the same ultimate purpose, to improve their work, to observe new machinery, to observe new methods. All done ultimately to reduce costs, because these defendants must compete with each other even in efficiency, because labor and material was increasing costs so much in one direction that it behooved them to cut costs in every other direction, if they could.

I find getting costs down by either of these methods of imitating the other fellow to cut costs or learning more efficient methods to better compete with him ultimately keeps prices down, too.

I find that cost information was here exchanged to improve productive efficiency and to lower costs. If costs were to be lower, it could come only from such costs because labor and material costs were beyond everybody's control.

The professional meetings of accountants had to do with an exchange of technical, theoretical professional ideas of organization in the steel castings industry. From the testimony they never had any discussions of pricing problems.

As to royalty reports, many industries and businesses furnish reports to others of their activities, such as trade associations, credit associations and others. I can see no violation in furnishing such reports.

They all show, insofar as this case is concerned, that the little one gets more business and the big one gets less. So I cannot see wherein royalty reports have the efficacy which is here claimed by the plaintiff's side.

Now the circumstance that lack of new venture capital proves that others are unlawfully excluded from this industry is something we should consider here.

There was a lot of talk about why no one else gets into this business, why in all these 50 years only three or four people asked. If it's so good why does everybody keep away from it except a few that were in it in the first place?

As to any inquiries seeking to get into this business since 1945, National alone received one in these last 13 years, and no other defendant even knew they had it. And the one it received, as I will mention later, I do not believe was of any serious consequence.

Now Mr. Kerr cited some economic factors which he said would account for the failure of others to go into this industry. He mentioned that the present capacity was adequate to meet the demand; that they are in a shrinking market—they have less cars now than 25 years ago; that special rigging and equipment would be required at great expense; and that their

licensing policy to give licenses to any qualified manufacturer is fair to all.

Plaintiff claims that since no new competitors have come into the business that they have therefore been kept out. That's the intimation they make and the circumstance they wish me to follow.

Not once in all these weeks of trial have we learned of anybody in particular who desired to actually get into this business and who had the competency to get in the business, who was kept out.

I find that nobody ever wanted to get in. I find that nobody was kept out.

And the evidence before us and common knowledge on the subject indicates some good reasons why new venture capital would avoid it. The circumstance that no new candidates applied is no more cogent than the circumstance that any candidate with money would be very careful about applying. Venture capital is what we call "smart money," gentlemen. It doesn't make any silly mistakes. The question here is would it not have been silly and ridiculous for them to get in this kind of a business.

Now to prove its contention plaintiff has dug up over a half century search what it considers as real applicants for the business. I find from the evidence before us that the Ohio Brass, which is one of their candidates, if I may call them that, never intended to manufacture the standard coupler at all and so stated.

I find that another of these four or five over a 50-year period is the Maritime Steel matter. No license could be given them since the license for Canada had been given to the Canadian Steel Corporation to whom they were referred. They are an outfit looking for what those in the theatrical business would call an "angel". They want somebody to finance them.

They'd get into the business if someone else paid. They had their hand out, too.

In the Southern Railway matter I find no proof to show defendants combined to exert the pressure herein claimed. Southern Railway weren't serious at all, and said so. They used the expression they were only "toying" with the idea. So I find Southern Railway never asked for a license and the evidence shows they didn't want one. As they said, they were toying with the idea of getting into the manufacture of coupler parts. When people "toy" with ideas, the Court shouldn't take them any more seriously than they did themselves.

In the Pratt & Letchworth matter we find they wanted information on the necessary procedures to manufacture a yoke, namely the Y–30.

They were told to whom they should write, to Symington-Gould who designed that yoke and to Buckeye who had a patent on the pin support. They were then told to ask the Chairman of the Mechanical Committee for drawings. They asked how to do that and they were told how to do that, and they were never heard from again.

To me none of this 50–year evidence in these four isolated cases or instances constitutes any circumstance in plaintiff's favor. To me it proves the exact opposite of what the plaintiff claims for it.

It is further said that suits were improperly threatened by some of these defendants here as a matter of pressure, patent suits. They were going to be brought in three or four instances in over a 50-year period, namely in 1921, 1924 and in 1940.

May I say, gentlemen, if that's all the patent suits that were ever threatened, there wasn't any barratry involved.

Who has a better right to sue over patents than the patentors who are given such right by another branch of our own Government? Since there has been no such suit threatened in 17 years, it doesn't concern our injunction suit here very much, does it?

Plaintiff here says others are improperly kept out of this business. The defendants have proved nobody wants in.

After so proving the defense offers some very cogent reasons as to why nobody wants to get in.

We have a 20-page exhibit here—well, I can't quite find the name of it but it is this blue book which you all have, National Malleable's Exhibit 294, indicating it would cost a little over $900,000 for a foundry already well-equipped with its own machine shop set up, a foundry already in a going business, with its own plant in operation and with space for such use to become equipped to make the type of railroad parts with which we are here concerned.

There is evidence here by defendant ASF that the railroads are in an industry which is in a condition of contraction. Defendant ASF suggests that railroads are going out of business and losing business; that planes and buses are picking up their passenger service; that trucks are picking up their freight business. It is a matter of common knowledge that the industry is in some state of contraction; that planes give much faster travel to passengers at practically similar costs; and that buses charge passengers about one-half as much; and that the trucks which carry freight from door-to-door have become a great convenience to the public. And door-to-door means you are only dealing with one transporting company, and when you deal with a freight train you have to hire somebody to take your produce to the railroad dock, you pay the railroad to move it somewhere and then

you pay somebody else to move it from that railroad dock to its destination. The trucks move door-to-door. They are a great convenience, gentlemen.

On the other hand it is equally a matter of common knowledge that capital of the size required here seeks to enter businesses which have a fair chance to both profit and expand. New science and arts now claim the attention of prospective capitalists. The aircraft industry does not have to buy the airports. Buses use the public roads. New capital has little interest in the purchase and maintenance of heavy equipment, tracks, roadbeds, bridges, signal equipment, and depots. I do believe that no part of the railroad business today has what it takes to entice new venture capital to risk itself, because it cannot either profit or expand and its future is comparatively dismal alongside of the investment opportunities in the ventures which entice America today, such as in the electronic and nuclear fields.

None of this was in the evidence except that which was said about buses, trains and planes. We all know as a matter of public knowledge investors aren't going to put their money into anything except that which looks like a winning venture with a capacity for some ultimate actual profit. As a matter of circumstantial evidence it is far more probable that venture capital stays out of this business because it doesn't want to get in rather than it is kept out by unlawful combination.

I find that nobody of the industry here decided to keep anybody out. The ones on the outside never evinced any desire to get in, and that means that over a 50-year period not one applicant evinced such desire. The reason why they wouldn't are very apparent and those reasons are not the result of any illegality.

Transportation ever changes in this great country. The Ohio Canal made our city great back in 1832. A few years later came the railroads and the Canal went out of business. Buses, planes and trucks now push these railroads around a little bit.

Railroads are selling their depots. No railroad today can afford to replace its own bridges or buildings. Since our case began here—it doesn't hurt to say it for it cannot influence any jury very much, nor will it concern any finding I am making—our oldest railroad, the B. & O., asked for the privilege of ending its passenger service, and the two biggest wish to join each other, I presume if the within plaintiff doesn't object.

It's what we call in the divorce court a business marriage and here necessity is the shotgun. Up to now these two great railroads would never get under the same roof anywhere. Every road in Cleveland goes into our Terminal Building but one, and when this lawsuit was just middleaged back in the 1920s and 1930s, the same two built great monumental depots in New York City so they could tell the world, in a sense, that no love was lost between them. But times have changed. All of this is worthy of illustration though it is not a circumstance before us by way of evidence.

Another feature which concerns venture capital is its desire, if it can do so and it has the choice to do as it will, to avoid any business subject to Governmental regulation, even though it be common carrier.

And I ask each of you good lawyers, forgetting the record and forgetting the lawsuit, since we had rent controls, which one of you ever heard of anybody in the form of venture capital who built one single house so he could rent it? At the same time, the venture capital which will no longer go into private homes

will buy into industry which produces what goes into homes, such as cement and lumber and glass. The analysis of what causes people to invest or not to invest is a study far beyond our task today. But from the viewpoint of circumstantial evidence, the fact that no serious new investor took this business seriously in half a century doesn't prove that the door was shut against them. To me it proves they were too smart to step into any such financial trap.

Mr. Bernstein in his closing argument says that the defendants here have an intent to monopolize and that in favor of his contention is the fact that no new manufacturers have come into the picture in a long time. Against this contention is all the evidence we have had showing no serious competent applicant ever has applied, in addition to which it does appear to me that venture capital would be too intelligent to get into a business with no capacity for profit and no possibility for expansion, as I have outlined. This business never looked as good to venture capital as it seems to appear to the plaintiff.

Mr. Bernstein argues as to how defendants react when prospects appear who are concerned with the business. And from the activities of these various defendants he thereupon argued they just wouldn't let anybody in.

Now the truth is, gentlemen, that applicants of no really serious nature ever appeared on the scene except at very rare intervals and many years apart.

And the strongest conclusion one comes to is not how defendants reacted to keep them out, but the strong conclusion one gets is how repugnant this business must be when it elicits so little interest. It must be repellent because nobody wants to gamble when there is no chance to win.

I believe that is why there has been no venture capital here.

Circumstance No. 6 has to do with improper patent control.

The evidence shows that after the end of the Trust Agreement in 1944 there was need to continue patent licensing to enable manufacturers to avoid infringement. They were renewed on a two-year basis up to 1956, and are still in process.

Plaintiff's great complaint on this is as to the method. Since the protection of the people requires the continuity of some system of scientific and progressive efficiency such as has been hereinbefore utilized. I can find no illegality in the preservation of that efficiency in the same hands as heretofore. The suggestion of change, in what amounts to the custodial care, suggested by Mr. Bernstein, of all these instrumentalities might or might not be effective. I don't know. It certainly isn't our function to authorize such experimentation with somebody else's property and somebody else's industry. Ours is to decide whether there is such current illegality here as to require current injunction.

It is true that after 1945 non-exclusive licenses were issued by defendants to each other. Price-fixing from that time on was eliminated, quotas thereafter were eliminated, concert of action after '45 was eliminated.

Since 1945 non-exclusive patent licenses have been issued to accomplish the interchange of patent rights necessary to continue the manufacture of the standard coupler, and these have been kept up on a two-year basis to date.

I can see no illegality in that.

Mr. Bernstein objects to the method and system of those who have patented these products and who have

joined their various geniuses to standardize parts in the way in which they have issued licenses.

He says, and I quote, "They impose themselves as the authority to issue licenses." Since it pertains to their own patents in which the Government has guaranteed their property rights for the purpose of inventor encouragement, who else has any better right to exercise such authority?

And if patent laws give them authority, then can it be justly complained that they impose authority on themselves just because they decide how they will share it with others? If those having rights are not to be fairly permitted to share them with those to whom such rights can be safely entrusted, then shall some other agency be invented to hold and dispose of such property rights? I find from the evidence that no applications for licenses have been made since 1945, thirteen years ago. Since nobody wants one and nobody asks for one, I cannot consider in today's case for injunction this invisible man who has been conjured up with a hat in his hand and who has been around here for twelve years, if he exists.

I must find that since there has been no evidence that anybody wants one, that for lack of such proof, nobody wants one.

The National Malleable witnesses have said it is their policy to consider any qualified manufacturer for a license. I don't believe any qualified manufacturer has applied. There has been no such evidence here. I don't believe anyone has ever been excluded except that imagined personality that was invented here in the process of the case.

We find that Buckeye holds no patent here whatsoever. It operates on licenses from someone else to make what they have patented. The royalties are so nominal that a non-owner is at no disadvantage

whatsoever. Royalties are never equal to one-half of one percent of the selling price, so the owners have taken no advantage whatsoever of the non-owners.

The Government has here suggested that the method followed in the renewal of licenses is a factor of what they consider a conspiracy herein. The success of Buckeye since 1945 disproves the claim. Holding no patents, operating on licenses from others, receiving them without asking for them as they have testified, they give the patent owners the biggest competitive headache they get.

There has been some argument of counsel here which deserves particular mention.

Mr. Davis in argument calls attention to the fact that plaintiffs changed their theories during the case. He says they originally charged that after 1945 the manufacturers met and by discussion would fix prices among themselves and make agreements, and that later National would announce results and others would follow. But that they didn't then claim that National would make its own independent decisions and that others would follow as the evidence they had adduced has since disclosed.

I find herein that Moriarty did make his own independent decision on prices for National, and I find from the evidence of plaintiff that all others then followed National's prices as to couplers, in particular.

It does appear that as to this phase of the case the plaintiff shifted. It does appear that plaintiff did not amend. It does leave plaintiff to some degree in a situation wherein it seeks to advance the theory here that parallel business behavior on the point of similarity of price constitutes a violation of the Sherman Act, which it does not.

Counsel for Symington-Gould suggests here that if the plaintiff is right then a lot of fine people must have committed perjury. He says they get National's price list first from a friend at the New York Central, and then they call and get a copy. But they never got a copy until after it has gone out to the trade.

I find from all the evidence that this is how it was done. There is no evidence to the contrary and I believe all those witnesses spoke the truth.

Plaintiff here contends that two-year leases imposed quotas on the little companies. Plaintiff's Exhibit 1143–1781 shows on tons shipped little Symington-Gould had 18.23 percent of all coupled business in 1954, and ASF, a big one, had 16.59. Mathematics can be very convincing, gentlemen.

Symington-Gould's official said that after 1945 the new licenses opened the way to solicit business everywhere. The doors were opened wide. I find that the mathematics here submitted have so proven.

Mr. Sellers for McConway & Torley says that while plaintiff's counsel cited 316 U. S. 265 and 306 U. S. 208, he forgot to cite 346 U. S. 540 which overrules the two cases previously mentioned.

He also denies that the defendants are dominated because licenses must be renewed, and says his company receives them every two years without even asking for them.

He says they get all the business they can and the figures which we have particularly shown for them indicates that that is true.

Now Mr. Thomas for the AAR argues that the Bernstein proposal for changing this whole operation as he outlined it in argument would undermine the standardization which the Government has heretofore approved. Mr. Kerr had previously argued it would

deprive defendant manufacturers of rights guaranteed by another branch of the Government.

Frankly after I heard how Mr. Bernstein was going to put the Court into this business, and after I heard his ideas as to how the business could be run right, if they weren't only so cheap, as he stated in his argument, the more I heard of his substitute committees, the better the present system looked to me, with all due respect to Mr. Bernstein as a lawyer.

But my first concern is always as to whether or not plaintiff has here proved its case. Mr. Thomas quotes Mr. Bernstein as saying that the AAR has done something unwittingly here in failing to police what others have done. Unwittingly means unknowingly, unconsciously and not intentionally. Defendant AAR is really here charged with intentionally doing something which it did unintentionally. They are accused of being an unwitting conspirator.

I must confess that I have participated in criminal practice many years, both in prosecution and in defense and on the bench, too, and a charge of having been an unwitting conspirator is one I do not quite comprehend. I have always believed that a conspirator had some consciousness of the existence of the conspiracy of which he was a part.

Mr. Thomas says that under the AAR rules any railroad may accept cars not equipped with standard couplers, and that no rule requires purchase of any special coupler. They recommend only adoption of standards. He says that they have encouraged, approved and recommended many railroad parts whether certain defendants liked it or not, and that they boycott no one.

Mr. Thomas says, and he argued quite logically on the subject, that Mr. Bernstein's proposal if ever put into effect would result in boycotts. Mr. Thomas gave

us a detailed history of events in his Association, and I believe that what he said had a ring of truth in its every word. And I believe that he spoke truly when he attested to the honorable dealings of his clients over the years.

There is something about the ring of truth, which a great writer, Alexander Dumas, mentioned as having been strange when you hear it in a court room. And in his book on Les Miserables, the miserable, he said that when truth rang out even the judge had to listen.

Mr. Thomas gave his recital on what his Association had done, I say again it had the ring of truth in it. I agree with Mr. Thomas that Mr. Bernstein's suggestion as to how this business ought to be run would not give us in this instance any panacea.

I agree with Mr. Thomas that his people boycotted no one.

Now Mr. Bernstein in his final argument said that no one will appear on the horizon tomorrow to go into this business. Well, I think that is quite true because no one has appeared on the horizon for the last 50 years to go into the business.

I don't think there is any question but what plaintiff's witnesses here who were connected with the defendants' case also told the truth throughout when they said there was no combination. I noticed the engineers in particular—and they have come in for a little criticism in this particular—they were so anxious to explain their answers particularly on engineering problems, because in their work whoever asks a question must be given a mathematically complete answer because otherwise terrible consequences might ensue, to the point where to cut down on a lot of conversation not legally responsive, defense counsel had to ask me a number of times to strike the unre-

sponsive answer of these witnesses. They were so anxious to talk they couldn't stop. I have always found men that did that quite honest. They are too anxious, one might say, to limit their answers, and I am not thinking of verbose individuals because engineers are not.

Mr. Bernstein asks in his final argument, would the defendants license an outsider at nominal royalties today? I don't know the answer to his speculative question. And since no competent bidder ever appeared, one doesn't know.

Mr. Bernstein says, "Let us predict the future." As I have said, gentlemen, in this business there is no future. The railroads as a class are appreciated in wartime because no one else can move heavy material in bad weather, and no one else gets through in floods or catastrophes. But other than in this one war service, as a rule their contribution to industry is quite unappreciated except by those who know them well.

It does appear to me as if the contraction in their business will result in a constriction and ultimate strangulation. I don't know what Mr. Bernstein meant when he said let us predict the future, but I do believe in this business the lack of future is what has kept others from investing in it.

Mr. Bernstein argues that there is monopoly here. One of the general characteristics of monopolies is that we find them in good businesses which are profiting and expanding, which everybody else wants to get into, and we have people on the inside who have such a good thing they do not want to let anybody else in because they are so jealous of the good things they have. We are not dealing here with any such attractive future possibility.

This indicia of monopolies is conspicuously absent here. I see no such monopoly going on today. I see no cognizable danger of recurrent violation here.

If there has been violation in the past, and I am really not called upon to find there has or has not been up to 1945, there is surely no cognizable danger of its recurrence today, thirteen years thereafter. Whether or not there has been a violation in the past, my question here is as to whether or not injunction is required today to forestall future violations.

Mr. Bernstein talks about the American Tobacco case, 328 U. S. 781, and instructions to a jury in such case, which instructions were approved by the Supreme Court. And he defines monopoly as being a joint acquisition or maintenance, from such case, of a conspiracy formed for the purpose and to such extent that they are able to exclude others from such business, accompanied by intention so to do.

I find no unlawful acquisition, no unlawful maintenance, no unlawful exclusion, and no unlawful intention here.

I find quite a battle for business among these defendants in an industry so unpreposing that in a period of 50 years no manufacturer of any competence was ever interested in entering the field. One or two letters evinced no such interest.

If rivalry is a stimulant to industrial success, which was another test mentioned by Mr. Bernstein as he quoted from these decisions, then surely the rivalry here over the last thirteen years indicates that this is not a monopoly.

Mr. Bernstein quotes another U. S. opinion to the effect: "No monopolist monopolizes unconscious of what they are doing."

Now, it is time the AAR learned of that because they are here accused of having gone into a monopoly unwittingly.

As to Mr. Bernstein's final suggestion as to how this industry should be run; I must say I cannot agree with him that the Court should experiment to the extent he asks, and I must say I see no particular efficacy in the suggestion. I can understand his opinion on the law, and I can understand his opinion on evidence, but when it comes to running somebody else's business, gentlemen, even if it isn't in the record here, it is worthy of comment that there is a human tendency to recognize a weakness in another when he's on the job—and every time you sit and look at television you imagine how much better you could do if you were only in that boxing contest, you can tell exactly when some fighter should have ducked, you can tell exactly how he should have swung and what kind of uppercut he should have brought up from the floor; when you watch a football game you can see so many opportunities of interception and you wonder why these athletes don't intercept and you figure you could have intercepted; it's got so we build special places, at least in this town, for observers who are called sidewalk superintendents to watch buildings going up and figure how much better it could be done—and I do not say this critically.

I am trying to get at the proposition that we lawyers cram our minds for a lawsuit this week and empty it Sunday afternoon and get ready to cram our minds for another lawsuit next week. Our great art is the capacity to fill our minds and then empty them as if it were a sieve to get ready for the next case.

Jim Davis had to argue a case in the United States Supreme Court within the last week in the middle of

trial here. He had to forget all about this six-week venture in this room and go down there, and then he had to forget about his case there—and he hasn't yet told us how he came out—and get back here and then cram himself about this. Our art is to get it together and then tear it apart for the next lawsuit.

We should leave the engineers to their own field, because generally, and I do not say this unkindly, I have noticed all my life when lawyers become businessmen or turn into real estaters or insurance brokers they always become that much less of a lawyer, and I think we should go on the assumption here that these people have done a good job and they know better how to protect and preserve their industry for the benefit of these United States than we who learned it for the purpose of a lawsuit and must forget it for the immediate purpose of the following lawsuit.

I find that the case of *Cole* vs. *Hughes Tool,* 215 Federal 2nd 924, has application here. In the facts which it outlines it has more facts resembling ours than any other case in the books, I believe.

I do not find the *Interstate Circuit case* 306 U. S. 208, of application. I cannot find for the plaintiff on it that as a matter of law, as plaintiff suggests, he is entitled to such finding. I see no cogent similarity between that case and ours.

I think the case of *U. S.* vs. *Grant,* 345 U. S. 629 is of direct application here. It requires a cognizable danger of recurrent violation of which I here find none.

The same is true of *U. S.* vs. *Oregon Medical Society,* 343 U. S. 326, stating that the sole function of injunction is to forestall future violations of which I here see no danger.

I would like to make one observation here. I believe that all of the graphs before us, all the information before us as to the proof of the intense competition between these parties since 1945, and the fluctuation of their sales as they all fought to take some part of that 100 percent of the business away from each other for there was no other business they could take or procure, if all the proof before us here about the efforts these defendants have been making in competition with each other since the wraps of the Trust Agreement have ceased to limit them, if all that was known to Lewis Bernstein before the civil and criminal actions were filed, I do not believe they would ever have been filed.

In our war with the criminal class we always ask them what they have to say about any crime of which they are accused. In criminal procedure we give all a chance to talk so that if their defense be that their act was excusable or justifiable or accidental or in self-defense or intentional or not, they may have the privilege of saying so.

Here it seems that all these defendants were ever asked was to furnish information against themselves. And our legal life is so constituted that the defense later on didn't dare expose its defense after these actions were filed.

It is a shame that somewhere along the line Mr. Bernstein didn't know of the compilations of these graphs showing the fluctuations of these sales as appear in this particular exhibit showing how some went up and some went down and only one appeared to be stationary whatsoever, and how the big ones went down here and how the little ones crept up in the years particularly between '48 and '57. This complete mathematical demonstration of the falsity of the premise of the plaintiff here is assuming that just

because there are so many people in the business they must keep everybody out, and because they once fix prices they must now be fixing prices in the same way as was outlined, as Mr. Davis claimed, in the petition here. Of course the proof had to do with a different matter, namely, that of following the leader, as it is called.

It seems unfair that men of the high standing with which we here dealt, and companies of the high standing with which we have here dealt, should suffer such stigma and disgrace and publicity, and financial loss, and they and their familiaries and friends should be so chagrined, when it was all avoidable in the first place, had all the facts been known—and I blame nobody because that seems to be the regular system.

But it does seem comparatively unfair that they do not get the same rights as would be given anyone else accused of any other kind of crime. I will say again, having observed the competency and fairness and courage of Government counsel here, I do not believe if he originally knew the material which was evolved on this defense that we would be here at all. And I say that because I honor and respect him.

Now all of you lawyers must appreciate that I cannot here cover every possible difference of opinion between your contending sides on each and every item on which you have differed over all these weeks.

I have tried to keep track of this evidence with voluminous notes, and I have sought to follow and digest or agree with or disagree with every point all counsel has made for the purpose of telling you crystal clear what I ultimately find from all the evidence in the case and all the law you have cited to me.

I find no conspiracy and no unlawful combination here whatsoever, nor any unlawful price-fixing or quotas or improper controls over littler companies.

I find that the evidence discloses that lack of any inquiries since 1945 as to the possibility of getting into the coupler manufacturing business is due to economic causes which have been mentioned, and not to any illegalities on the part of these defendants. I see no requirement whatsoever that injunction be here granted.

I find that there is no activity going on at the present time or likely to occur in the near future which is either properly susceptible of injunction or which would justify equitable relief in any form.

I cannot recognize any need for this Court's attempting to operate this industry along the lines of Mr. Bernstein's plan.

I find that this complaint should be dismissed in its entirety and judgment rendered for defendants.

I now ask counsel at your early convenience—and it applies to all counsel—to submit written findings of fact and conclusions of law and journal entry in accordance with my verbal findings herein.

I thank counsel for the honor of your having graced our court room for these past two months.

All of which is said to the objection and exception of plaintiff.

APPENDIX B

In the United States District Court for the Northern District of Ohio, Eastern Division

Civil Action No. 30281

UNITED STATES OF AMERICA, PLAINTIFF

vs.

NATIONAL MALLEABLE AND STEEL CASTINGS COMPANY, AMERICAN STEEL FOUNDRIES, THE BUCKEYE STEEL CASTINGS COMPANY, THE SYMINGTON-GOULD CORPORATION, MCCONWAY & TORLEY CORPORATION, FOUNDRIES EXPORT CO., INC., AND ASSOCIATION OF AMERICAN RAILROADS, DEFENDANTS

JUDGMENT

This cause having come on to be heard, was tried to the Court without a jury, and was submitted on the pleadings, the stipulations of the parties, the evidence, and arguments of counsel.

The Court, after due deliberation, having rendered its decision, and having filed its Findings of Fact and Conclusions of Law, comes now to the entry of judgment herein.

NOW THEREFORE, by virtue of the law and pursuant to the Court's decision and its Findings of Fact and Conclusions of Law, it is ordered, adjudged and decreed that the Complaint be and it hereby is dismissed, with prejudice.

/s/ JAMES C. CONNELL,
United States District Judge.

Dated: March 12, 1958.

U. S. GOVERNMENT PRINTING OFFICE: 1958